John Henley Caulking and Waterproofing Co. *and* Pointers, Cleaners and Caulkers, Local 35 a/w Bricklayers and Allied Craftsmen International Union. Case 4–CA–22224

September 21, 1994

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS DEVANEY AND BROWNING

Upon a charge filed by Pointers, Cleaners and Caulkers, Local 35 a/w Bricklayers and Allied Craftsmen International Union (the Union) on November 5, 1993, the Acting General Counsel of the National Labor Relations Board issued a complaint on February 17, 1994,[1] against John Henley Caulking and Waterproofing Co. (the Respondent), alleging that it has violated Section 8(a)(1) and (5) of the National Labor Relations Act. Although properly served copies of the charge and complaint, the Respondent failed to file an answer.

As no timely answer was filed and no extension of time to answer was requested or granted before the due date, the General Counsel filed a Motion for Summary Judgment with the Board on June 13. On June 16, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed no response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

Sections 102.20 and 102.21 of the Board's Rules and Regulations provide that the allegations in the complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. In addition, the complaint affirmatively notes that unless an answer is filed within 14 days of service, all the allegations in the complaint will be considered admitted. Further, the undisputed allegations in the Motion for Summary Judgment disclose that the Region, by letter dated May 17, notified the Respondent that unless an answer was received by May 24, a Motion for Summary Judgment would be filed with the Board. No answer was received by the Regional Office by that date, and the Respondent did not request an extension of time for filing an answer. Accordingly, the General Counsel filed with the Board the Motion for Summary Judgment on June 13. On June 16, the Board issued the Notice to Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Thereafter, by letter to counsel for the General Counsel dated June 27 and received by the Region on July 5, the Respondent apologized for its ''failure to respond in a timely manner to the Complaint.'' The letter continued, ''It has been a very demanding year for me with a seemingly endless stream of problems, and this was simply something that I mistakenly overlooked.'' The letter does not deny the material allegations of the complaint. Rather, it attempts to explain why the Respondent engaged in the allegedly unlawful conduct. The Respondent requested that the unfair labor practice hearing be held. On July 21, the General Counsel filed a response to the Respondent's letter. The General Counsel contends the letter provides inadequate excuse to avoid summary judgment, is inadequate to serve as an answer, and provides no defense to the complaint allegations.

The Respondent's letter does not satisfy the requirement of the Board's Rules that good cause be shown for the failure to file a timely and proper answer. The Respondent offers no sufficient explanation for its failure to act for more than a month after the extended deadline for filing a timely answer. Further, the Respondent's letter is insufficient as an answer to the allegations of the complaint.

Accordingly, in view of the Respondent's failure to file an answer that comports with the Board's Rules, and in the absence of good cause being shown for the failure to file a timely and proper answer, we grant the General Counsel's Motion for Summary Judgment. *H & D Trucking*, 297 NLRB 543 (1990).

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent has been a Pennsylvania corporation engaged in the business of caulking and waterproofing, with a facility located in Trevose, Pennsylvania. During the 12-month period preceding the issuance of the complaint, the Respondent, in conducting its business operations, performed services valued in excess of $50,000 outside the Commonwealth of Pennsylvania. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The following employees of the Respondent (the unit) constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All pointers, cleaners and caulkers employed by Respondent, excluding guards and supervisors as defined in the Act.

[1] All subsequent dates refer to 1994 unless otherwise specified.

About September 1993, the Respondent, an employer engaged in the building and construction industry, granted recognition to the Union as the exclusive collective-bargaining representative of the unit by agreeing to enter into a collective-bargaining agreement with the Union for the period from about September 1993 to about August 31, without regard to whether the majority status of the Union has ever been established under the provisions of Section 9 of the Act.

For the period from about September 1993 to about August 31, pursuant to Section 8(f) and Section 9(a) of the Act, the Union has been the limited exclusive bargaining representative of the unit.[2]

About September 1993, the Union and the Respondent reached complete agreement on terms and conditions of employment of the unit to be incorporated in a collective-bargaining agreement.

Since about September 1993, the Union has requested that the Respondent execute a written contract containing the above agreement. Since about the same date, however, the Respondent has failed and refused to execute the agreement.

CONCLUSION OF LAW

By the acts and conduct described above, the Respondent has failed and refused to bargain collectively and in good faith with the limited exclusive collective-bargaining representative of its employees, and has thereby engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5), Section 8(d), and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent has failed and refused to execute a written contract containing the agreement it reached with the Union about September 1993, we shall order the Respondent, on request, to execute the agreement and apply the terms of the agreement retroactively from its effective date, making unit employees whole for any loss of earnings and other benefits attributable to its unlawful conduct. Backpay shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[2] In the absence of any need to determine in this proceeding whether the parties' relationship is governed by Sec. 9 or by Sec. 8(f), Member Browning would not reach that issue.

ORDER

The National Labor Relations Board orders that the Respondent, John Henley Caulking and Waterproofing Co., Trevose, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain in good faith with Pointers, Cleaners and Caulkers, Local 35 a/w Bricklayers and Allied Craftsmen International Union, as the limited exclusive collective-bargaining representative of the employees in the following unit, by failing and refusing to execute a written contract containing the agreement it reached with the Union about September 1993:

> All pointers, cleaners and caulkers employed by Respondent, excluding guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, execute the agreement it reached with the Union about September 1993, and apply the terms of that agreement retroactively to all unit employees from its effective date.

(b) Make the unit employees whole or any loss of wages and other benefits due to its failure to execute the agreement it reached with the Union about September 1993, with interest, as set forth in the remedy section of this decision.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the annount of backpay due under the terms of this Order.

(d) Post at its facility in Trevose, Pennsylvania, copies of the attached notice marked ''Appendix.''[3] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail and refuse to bargain in good faith with Pointers, Cleaners and Caulkers, Local 35 a/w Bricklayers and Allied Craftsmen International Union, as the limited exclusive collective-bargaining representative of the employees in the following unit, by failing and refusing to execute a written contract containing the agreement we reached with the Union about September 1993:

> All pointers, cleaners and caulkers employed by Respondent, excluding guards and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, execute the agreement we reached with the Union about September 1993, and apply the terms of that agreement retroactively to all unit employees from its effective date.

WE WILL make unit employees whole for any loss of wages and other benefits due to our failure to execute the agreement we reached with the Union about September 1993, with interest.

JOHN HENLEY CAULKING AND WATERPROOFING CO.